

No. 17609

United States Court of Appeals
For the Ninth Circuit

ALBIN STEVEDORE COMPANY, a Washington Corporation,
Appellant,

vs.

CENTRAL RIGGING & CONTRACTING CORPORATION,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

BRIEF OF APPELLEE

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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BRIEF OF APPELLEE

JURISDICTION

District Court.

This action was commenced by appellant in the Superior Court of the State of Washington for King County to recover sums totaling \$22,060.97 which it claimed was due it from appellee for services performed in loading and stowing a cargo aboard the "Despina C" at the Port of Seattle in August, 1959. The complaint contained two causes of action: one for \$6,000, alleged to be the balance due under the written contract; and the second cause of action for \$16,060.97 for alleged extras pursuant to an alleged oral agreement therefor (Tr. 5-9).

Appellee promptly transferred the action to the United States District Court for the Western District of Washington, since the matter in controversy ex-

ceeded the sum of \$10,000, and because of diversity of citizenship (Tr. 1-3). The requisite bond for removal was filed with the petition (Tr. 10). The District Court had jurisdiction by virtue of 28 U.S.C.A., § 1332, and § 1441 (a).

Circuit Court.

Final judgment of the District Court herein granting appellee's cross-motion for summary judgment of dismissal was entered August 24, 1961 (Tr. 134). Notice of appeal therefrom was filed by appellant September 21, 1961. This court has jurisdiction of this appeal from said final decision of the District Court by virtue of 28 U.S.C.A., §§ 1291 and 1294, and Federal Rules of Civil Procedure, Title 28, Rule 73.

STATEMENT OF THE CASE

Appellant's Statement of the Case omits many facts that are essential to the proper consideration of this case. Appellee therefore feels compelled to make the following counter-statement containing all of the essential facts.

A. The History of the Litigation.

On August 14, 1959, the parties entered into a written contract whereby appellant undertook to perform certain stevedoring work in Seattle, Washington, for appellee. Portions of a certain written contract between appellee and Howard International, Inc. dated April 28, 1959, were expressly incorporated by reference in the written agreement between the parties (Tr. 48-67).

In substance the contract provided that appellant was to load, stow and lash a particular cargo aboard the

“Despina C” at Ames Terminal, Port of Seattle, within ten days of August 17, 1959, and that appellee was to pay therefor as the agreed contract price the sum of \$14,000 or a payment determined by an adjusted cost plus computation, whichever was lower.

Paragraph 10 of the agreement between the parties states:

“Upon completion of its work and within fifteen (15) days after receipt of the requisition from Albin, Central agrees to pay the balance due to Albin as agreed. As a further condition, Albin agrees to furnish to Central an affidavit by of (sic) Albin’s principal officers certifying that full payment has been made and that there are no persons or firms who have or claim liens arising out of or with respect to the work and in addition Albin agrees to furnish Central with waivers of lien from all subcontractors and materialmen.” (Tr. 50).

Paragraph 11 of the contract incorporated by reference Paragraph 22 of the underlying contract which with the required substitution of “Central” (appellee) for “Howard” reads as follows:

“Arbitration: Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration, in accordance with the Rules of the American Arbitration Association, and judgment upon the award rendered may be entered in any court having jurisdiction thereof. The arbitration shall be held in New York City, New York, or in Seattle, Washington, at (Central’s) option.” (Tr. 51, 65-66).

Despite the foregoing arbitration clause, appellant saw fit to institute an action on or about January 4, 1960, to recover the sum of \$22,060.97 which it claimed

was due it from the appellee for the services it performed. The complaint contained two causes of action: one for \$6,000, a balance due on the stipulated contract price of \$14,000 (appellee having paid \$8,000 on account) and the second cause of action for \$16,060.97 for alleged extras (Tr. 5-9).

After completion of the work, appellant claimed that it was entitled to receive \$16, 060.97 for alleged extras over and above the stipulated contract price, and prior to suit being commenced herein, appellee served and filed demand for arbitration with the American Arbitration Association seeking to arbitrate its differences with both Howard International, Inc. and appellant (Tr. 12, 34, 41, 43).

Subsequent to this demand for arbitration, appellant received from the American Arbitration Association a request for an answer, and appellant in the month of December 1959 notified the association that it objected to such arbitration upon the ground that the matters in dispute between the parties were not covered by arbitration, as well as upon other grounds (Tr. 42, 43). At or about the same time, appellant commenced the instant suit in the state court as heretofore mentioned. (The complaint was verified December 21, 1959 (Tr. 9) and served on appellee January 4, 1960 (Tr. 1).

Under date of January 7, 1960, the American Arbitration Association advised appellant that inasmuch as Howard International and appellant were not parties to the same contract with appellee and in the absence of an agreement by all three parties that the dispute be heard jointly, these matters would be heard separately unless stayed by order of court. Appellee was accord-

ingly directed to file an answering statement by January 18, 1960 (Tr. 43-44).

After transferring the state court action to the District Court, appellee filed a motion for stay of the action until arbitration was had in accordance with the terms of the agreement between the parties on January 18, 1960 (Tr. 11). On January 19, 1960, appellant filed its motion to enjoin and restrain appellee from proceeding with the arbitration proceeding, and urging that the matters in dispute between the parties be determined in the present action before the District Court (Tr. 40-42).

Prior to the hearing date on said motions, appellee filed its answer on February 10, 1960, and with respect to the first cause of action, it denied that plaintiff had fully performed its contract, and that a balance of \$6,000 was owed thereon, or that defendant conceded said indebtedness, and in particular denied that plaintiff had conformed with the provisions of Paragraph 10 of the contract requiring it to furnish an affidavit of receipt of full payment as a condition for receiving any balance due thereunder. It likewise denied plaintiff's second cause of action, and alleged as an affirmative and complete defense to both causes of action the afore-said arbitration agreement (Tr. 68).

Prior thereto, on January 21, 1960, it had filed an amended demand for arbitration against appellant only, which was substantially the same as that previously filed jointly against both Howard International and appellant, in accordance with the direction of the American Arbitration Association's letter of January 7, 1960 (Tr. 85-87).

The hearing on the repsective motions of the parteis was had before Judge Boldt on February 15, 1960, and he granted appellee's motion to stay the action pending arbitration, and denied appellant's counter-motion to restrain the arbitration proceedings (Tr. 72).

Thereafter appellant timely filed notice of appeal on March 14, 1960, from the order sustaining defendant's motion for stay and denying plaintiff's motion for restraner (Tr. 73). However, it voluntarily abandoned the appeal by filing its motion and affidavit for dismissal and for exoneration of the appeal bond (Tr. 74), and a formal order dismissing the appeal was entered by the court on February 7, 1961 (Tr. 76).

Thereafter no further steps in the litigation were taken until the arbitration proceeding was concluded by entry of judgment on the award by the Supreme Court of the State of New York on February 24, 1961 (Tr. 132). (The arbitration proceeding will be covered in subdivision B of this brief immediately following.)

On April 10, 1961, appellant filed a motion before the District Court to vacate the stay theretofore entered in the action, and to enter summary judgment in plaintiff's favor for the relief demanded in the first cause of action, i.e., for \$6,000 (Tr. 77). This motion was predicated upon the conclusory statement contained in the moving affidavit of Thomas A. Harnett, Esq., sworn to on March 30, 1961, wherein he averred in paragraph 12 thereof that the three arbitrators were designated and

“a single controversy as framed by the ‘amended demand for arbitration’ and the ‘answering statement,’ to-wit, the sum, if any, in excess of \$6,000 due and owing to Albin for work and serv-

ices performed in the loading and lashing of the MV Despina C was submitted to arbitration by them.” (Tr. 81).

Following this conclusory statement, Mr. Harnett asserted in paragraph 16 of the aforesaid affidavit that

“The sum demanded in plaintiff’s first cause of action was conceded to be due and owing to the plaintiff in the defendant’s ‘amended demand for arbitration’ *and hence was never submitted to arbitration*, and no jurisdiction thereof was conferred on the arbitrators and this would not and could not be included in the award made by the arbitrators on the controversy submitted to them.” (Tr. 82) (emphasis ours).

In response to this motion, appellee filed a cross-motion for summary judgment of dismissal (Tr. 101) and supported same by the affidavit of M. Emanuel Kaiser, Esq., of counsel for appellee in which he set forth in detail the issues and proceedings before the arbitrators, including excerpts from the stenographic transcript of the proceedings, and of the post-award proceedings before the Supreme Court of the State of New York for confirmation of the award (Tr. 103-118).

Although served and filed on April 20, 1961, no reply affidavit was interposed by appellant or his counsel controverting any of the factual data asserted therein.

The respective motions for summary judgment were extensively argued before Judge Boldt on August 15, 1961 (this date is not shown by any documents in the transcript) and the matters were submitted to the court entirely on the pleadings, affidavits and exhibits that were filled in support of the respective motions.

Thereafter the court took the matter under advise-

ment and on August 24, 1961 prepared and entered its own form of order granting appellee's motion for summary judgment (Tr. 134).

The court also concluded in said order that

“From a review of the entire record before the court, including the proceedings before the arbitrators, this court is satisfied that the arbitrators understood and intended that the agreed amounts owing plaintiff were included in the total award made to plaintiff.”

The present appeal followed the entry of said order (Tr. 135).

B. Proceedings before the Arbitrators.

(1) Issues submitted.

In its amended demand for arbitration (Tr. 85-87) appellee set forth its disputes with appellant in the following language:

“CENTRAL RIGGING & CONTRACTING CORP. hereby disputes and contests the claim of Albin Stevedore Company for the sum of \$22,067.97, and each and every part thereof, to the extent that said claim exceeds the sum of \$6,000. Said claim has been made by Albin Stevedore Company against Central Rigging & Contracting Corp. for payment of the work performed which was required by the aforesaid contract. The said disputed claim of Albin Stevedore Company for sums in excess of \$6,000 is based on the additional expense of Albin Stevedore Company in performing said contract caused by the alleged failure of Central Rigging & Contracting Corp. to furnish a ship with 45 ton boom and with other adequate loading equipment as allegedly required by the terms of the aforesaid contract.

Central Rigging & Contracting Corp. disputes and contests said claim on the grounds that the said contract provides for a maximum price of \$14,000 of which \$8,000 has heretofore been paid, and that there is no basis upon which Central Rigging & Contracting Corp. is liable for any sum in excess of \$6,000; in addition, the amounts claimed by Albin Stevedore Company as such additional expenses are hereby disputed.”

In its answering statement (Tr. 89-92) appellant denied that the matter submitted was the subject of arbitration, but immediately added:

“Nevertheless, this answering statement is submitted in order that the issues may be framed and *that the merits of this controversy may be finally determined.*” (Tr. 89).

Appellant further stated therein:

“Albin Stevedore Company specifically denies that its claim under the written contract referred to in the demand for arbitration is for the sum of \$22,067.97 because of certain facts which are not set forth in the demand for arbitration filed by Central Rigging & Contracting Corp. in its notice dated January 19, 1960, but avers that said amount of \$22,067.97 *is due it pursuant to said written contract and a subsequent oral contract hereinafter referred to.* Moreover, Central Rigging & Contracting Corp. in its demand for arbitration admits that the sum of \$6,000 is payable to Albin Stevedore Company for services rendered in loading and stowing of certain equipment on board the vessel ‘Despina C’. *Accordingly, Albin Stevedore Company hereby demands that the said sum of \$6,000 be paid to it forthwith.*” (Tr. 89-90) (our emphasis).

This answering statement concluded with the following prayer:

“Accordingly, Albin Stevedore Company requests:

“1. An award forthwith in its favor against Central Rigging & Contracting Corp. in the sum of \$6,000, the undisputed amount due it pursuant to the terms of the written contract referred to in the arbitration agreement and in the demand for arbitration filed herein by Central Rigging & Contracting Corp., and further

“2. An award in the sum of \$16,060.97 on the subsequent oral contract of August 21, 1959 together with interest on both awards at the rate of 6% per annum from September 3, 1959 until paid, together with the expenses incurred herein.” (Tr. 91-92).

During the course of the hearing before the arbitrators, the following ensued with respect to paragraph 10 of the agreement pertaining to the certification required from Albin as a condition for receiving the balance due under the contract (the questions were put to Mr. Robert Albin, President of plaintiff corporation):

“Q. Under your written agreement with Central, were you to furnish to Central, before the balance of \$6,000 was paid to you, an affidavit by Albin’s officers certifying full payment and that there are no claims against or liens against the job? Were you supposed to file that with Central?

A. There is a clause in the contract and I am prepared to do that. I was never asked to do the affidavit. I was unable to make contact with Central Rigging & Contracting Company.

MR. THILLY (one of the arbitrators): You haven’t done it, is that what you mean?

THE WITNESS: I haven't done so.

MR. THILLY: It provided for it, but you didn't do it so far?

WITNESS: Yes.

Q. You never provided waivers of lien before getting the \$6,000?

A. No, sir." (Tr. 107).

Apropos to this item, Mr. Kaiser, who represented appellee at that hearing, made the following opening statement:

"I don't want to burden the record with what we intend to prove. I do say that at the end of this proceeding it will become evident to this Board that there is a \$6,000 balance due them. I don't want the Board to penalize us for not having paid the \$6,000. We couldn't have paid the \$6,000 because when we paid the \$6,000 we were entitled to certain papers which they were unwilling to give us, certain releases, and an affidavit that there could be no claims against us for this work, so that we owe that \$6,000." (Tr. 108).

(2) *Excerpts of the stenographic transcript of the proceedings.*

As stated in the affidavit of Mr. Kaiser which was filed in support of defendant's motion for summary judgment, it was agreed that a stenographic transcript of the proceedings before the arbitrators be recorded and the expenses thereof shared equally by the parties (Tr. 109). He then referred the court to the portions of the transcript pertinent to the instant motions.

In his opening statement before the arbitrators, he said at page 8 (Tr. 109):

“We say, gentlemen, you may assess the \$6,000 which we owe on the contract, you may, further assess against us as damages up to an amount equal to \$1500 on proof that the money was spent for overtime for that Saturday and Sunday; the dates, I think were August 22nd and 23rd of 1959.

“But over and above that, there is no claim that Albin can make against us.”

Mr. Harnett, in his opening statement to the arbitrators, said at the bottom of page 18 and the top of page 19 (Tr. 109):

“We feel that we are entitled to an award for the aggregate amount of \$22,060.97.”

The court will note that this is the exact amount which the plaintiff sued for in its complaint in the District Court.

After this statement, Mr. Wallace Bock, the Tribunal Clerk of the American Arbitration Association, asked Mr. Harnett the following question at page 19 (Tr. 109-110):

“Does that amount include the \$6,000?” (meaning does the \$22,060.97 include the \$6,000.00).

MR. HARNETT: Yes.”

To substantiate its claim of \$22,060.97 the following evidence was elicited by Mr. Harnett from Mr. Robert Albin, plaintiff's president, at pages 67 and 68 (Tr. 110):

“Q. Furthermore, the only sum that you have been paid against this contract is the \$8,000 payroll advance that was made?

A. Yes, sir.

Q. The net due is \$22,060.97?

A. Yes, sir."

After both sides had rested in the arbitration proceeding, the following colloquy took place before the arbitrators, at page 336 (Tr. 110-111):

"MR. KAISER: Then, I think under the rules a decision may be made within thirty days.

MR. HARNETT: In view of the ten-day delay and the thirty-day delay, is it possible for an order of the Board that they pay the \$6,000 of which there is no dispute, forthwith, without prejudice to their position in this litigation?

MR. KAISER: I am afraid that under the rules of Arbitration, if the Board were to order that, the subsequent decision of the Board would be void.

Am I correct that there can be only one award in an arbitration:

TRIBUNAL CLERK: Yes, that's right.

MR. KAISER: And they can not break it up into anything but one award?

MR. HARNETT: If the Tribunal Clerk so speaks, then I have no objection.

MR. KAISER: There can be only one award."

Thus at the conclusion of the hearings before the arbitrators, Mr. Harnett renewed the demand he had made in the answering statement in the arbitration proceedings for two separate awards: one for \$6,000 and the other for such damage as the board found. Since it was made clear that the arbitrators could make but one award for all claims made by the plaintiff, Mr. Harnett was satisfied that there could be but one award by the arbitrators under the Rules of the American Arbitration Association, and stated that he

had no objection to one award which would include plaintiff's claim for \$6,000.

In the pre-hearing memorandum submitted by Mr. Harnett to the arbitrators, he made the following statement:

"This memorandum is submitted on behalf of Albin Stevedore Company in support of its claim in the aggregate sum of \$22,060.97 for work, labor and materials." (Tr. 111).

Further, in said memorandum, Mr. Harnett made the following statement under the heading "CONTENTION":

"Albin contends that pursuant to the agreements of the parties, the oral authorization of Central's president, the subsequent written approval by Central's pier representatives, and the performance of the work by Albin, that Albin is entitled to the sum of \$30,060.97, less the \$8,000 received, a net of \$22,060.97 for its work, labor, materials and services." (Tr. 111).

At the conclusion of the hearings, Mr. Harnett asked leave to submit a memorandum setting forth the actual damages he claimed he had proved during the hearings. His request was granted and he submitted his computation of Albin's damages in writing as follows:

- "1. Amount concededly due and not in dispute\$ 6,000.00
2. Amount of Albin's expenses in dispute\$16,060.97

Claim Established

- (a) Total payroll costs including fringe benefits and other applicable costs (1).....\$11,615.40

(b) Materials 20% of		
\$4,069.01 (2)	813.80	
(c) Rent of Equipment 20%		
of \$543.22 (2)	108.64	
	<hr/>	
	\$12,526.87	12,526.87
		<hr/>
		\$18,526.87

Plus interest at 6% from September 3,
1959, to date of award.....”
(Tr. 112)

An examination of this computation indicates that instead of the gross amount of \$22,060.97, Mr. Harnett maintained at the end of the arbitration proceedings that Albin had merely established damages of \$18,526.87, and he asked for an award in that amount plus six percent interest from September 3rd, 1959, to the date of the award, which line he left blank. Mr. Kaiser submitted a written reply to Mr. Harnett's computation of damage on behalf of Albin, and in said reply stated at the outset:

“Central Rigging & Contracting Corp. admits that it owes to Albin Stevedore Company the following sums:

\$6,000.00 representing the balance due Albin Stevedore Company on the written contract of August 14th, 1959;

\$1,291.05 representing payroll authorized by Harry Meyerson in a long distance telephone conversation on August 28th, 1959, for work, performed on Saturday, August 29th, 1959, the day the vessel sailed from Seattle.” (Tr. 112-113).

Mr. Kaiser then analyzed and took exception to the

various claims which Mr. Harnett made in his computation of damage, and concluded his memorandum with the following statement:

“It is our positoin that the award to Albin should be for \$6,000.00 plus \$1291.05, or a total of \$7291.05. No interest should be granted Albin because it should not benefit by its presentation of an unjust and exaggerated claim for payment.

“At best, if credence were to be given to Albin’s claims for breach of the written contract, to-wit: damages sustained by reason of alleged defective vesel equipment, it would then become entitled to an additional sum of \$243.14 for alleged lost time.” (Tr. 113).

(3) *The award.*

The pertinent provison of the award of the arbitrators reads as follows:

“1) CENTRAL RIGGING & CONTRACTING CORP., hereinafter referred to as CENTRAL, shall pay to ALBIN STEVEDORE COMPANY, hereinafter referred to as ALBIN, the sum of NINE THOUSAND FIVE HUNDRED DOLLARS (\$9,500.00) plus interest at the rate of six per cent (6%) per annum from September 18, 1959 to the date of this award *in full settlement of all claims submitted to this arbitration.*” (our emphasis) (Tr. 113, 121).

It is fair to state at this point that neither side obtained the result it sought in the arbitration proceedings. Appellee wanted the arbitrators to limit their award to the sum of \$7,500. Appellant originally requested the arbitrators to award it a total amount of \$22,060.97, and then by its post-hearing memorandum limited its claim to \$18,526.87. The arbitrators actually

awarded \$9,500 “in full settlement of all claims submitted to this arbitration” together with interest, and saw fit to reject the determination sought by each of the parties.

(4) Post-award proceedings before the Supreme Court of the State of New York.

On or about December 30, 1960, Mr. Harnett, on behalf of appellant, made a motion in the Supreme Court of the State of New York, County of New York, wherein he prayed for the following relief:

“WHEREFORE, deponent (Thomas A. Harnett) prays that an order be made herein confirming said award and directing that judgment be entered in the Supreme Court of the State of New York, County of New York and that Albin Stevedore Company be allowed the costs of this motion to confirm and that Albin Stevedore Company have such other and further relief as to this Court would seem proper.” (Tr. 114).

On behalf of appellee, Mr. Kaiser submitted an affidavit to the Supreme Court of the State of New York, in which he consented to the confirmation of the award as rendered by the arbitrators, but opposed Mr. Harnett’s request for costs on the ground that he had offered appellant the amount of the award, to-wit: \$9,500 plus interest, in accordance with the award, of \$672.90, or a total of \$10,172.90, and that he had informed Mr. Harnett that the appellee had already deposited with his firm the aforesaid sum of \$10,172.90 to satisfy the award of the arbitrators (Tr. 114-115).

The decision of the Supreme Court of the State of New York, confirmed the award without costs, and directed counsel to settle the order (Tr. 115).

Mr. Harnett then submitted an order for signature, the pertinent decretal portions of which read as follows:

“ORDERED that the award of Alvin A. Borgading, Frank D. Pillatt, Jr. and John E. Thilly, all of the arbitrators in the above entitled proceeding dated November 23, 1960, *whereby they determined a single dispute, to-wit, the sum, if any, in excess of \$6,000 due and owing to Albin Stevedore Company* for work, labor, and services performed in the loading of the M. V. DESPINA C, and awarded that Central Rigging & Contracting Corp. pay to Albin Stevedore Company the sum of \$9,500 plus interest at the rate of Six Per Cent (6%) per annum from September 18, 1959, to November 23, 1960, and that the administrative fees and expenses of the American Arbitration Association in the amount of \$481.20 be borne equally by the parties, and it is further

“ORDERED that the said Albin Stevedore Company have judgment upon said award in the sum of \$9,500 plus interest at the rate of Six Per Cent (6%) per annum from September 18, 1959, to November 23, 1960, and that said judgment be entered as a judgment in the Supreme Court of the State of New York, County of New York.” (emphasis ours) (Tr. 115, 123-124).

Being of the opinion that this proposed order submitted by Mr. Harnett on behalf of the appellant did not conform to the arbitrators' award and the decision of the court, Mr. Kaiser submitted on behalf of appellee, a counter-order which he felt was in conformity with the court's decision, and each party submitted memoranda in support of their respective proposed orders. In his memorandum, Mr. Harnett advanced the same conclusory interpretation of the award that is

now being advanced by appellant before this court, to-wit: that only "a single controversy to-wit, the sum, if any, in excess of \$6,000, due and owing to Albin" was submitted for arbitration (Tr. 125-127 at p. 126).

In his memorandum to the court in opposition to Mr. Harnett's proposed order, and in support of appellee's proposed order, Mr. Kaiser set forth that the arbitrators "did not limit their award to a single issue as set forth in the proposed order" of Mr. Harnett. He further stated that the court, in its decision, did not determine that the arbitrators awarded Albin \$9,500 on a single dispute. He further urged that "the aforesaid award was in conformity with the Amended Demand for Arbitration filed by Central, the Answering Statement thereto filed by Albin, and the issues presented to the arbitrators in the arbitration proceedings, as evidenced by the transcript of the proceedings before the arbitrators." (Tr. 128-129).

The court rejected Mr. Harnett's proposed order and entered the order requested by appellee (Tr. 130-131). The pertinent decretal portions of the order entered by the court read as follows:

"ORDERED that the motion of Albin Stevedore Company is granted to the extent that the award of Alvin A. Borgading, Frank D. Pillatt, Jr. and John E. Thilly, all of the arbitrators in the arbitration proceedings held before the American Arbitration Association, dated November 23rd, 1960, be and the same hereby is confirmed; and it is further

"ORDERED that the said Albin Stevedore Company have judgment upon said award against Central Rigging & Contracting Corp. in the sum of

\$9,500.00 plus interest at the rate of six per cent (6%) per annum from September 18th, 1959 to November 23rd, 1960, without costs, and that said judgment be entered by the Clerk of this Court.” (Tr. 131).

No appeal was taken by appellant from the aforesaid order dated February 1, 1961, and its time to do so has long since expired.

On February 24, 1961, appellant caused the Clerk of the Supreme Court of the State of New York, County of New York, to enter a judgment on the order affirming the arbitration award, the pertinent decretal portion thereof reading as follows:

“Adjudged that the said Albin Stevedore Company to recover of the said Central Rigging & Contracting Corp., the sum of \$9,500 with interest thereon from September 18, 1959, to November 23, 1960, at the rate of six per cent (6%) per annum, amounting in all to the sum of \$10,172.90 and that the said Albin Stevedore Company have execution therefor.” (Tr. 132-133).

On March 1, 1961, Mr. Kaiser's firm delivered its check in the sum of \$10,172.90 to appellant and received in exchange therefor a satisfaction of the aforesaid judgment, which was filed in the County Clerk's office of the Supreme Court of the State of New York, County of New York (Tr. 117).

SUMMARY OF THE ARGUMENT

1. The District Court's original order staying the action and refusing to enjoin the pending arbitration proceedings, conclusively established that both causes of action were covered by the arbitration clause. There-

fore, appellant was precluded from reasserting before the District Court that the first cause of action for \$6,000 was never submitted to the arbitrators, but was the subject of further affirmative action thereon, following the award and payment thereof.

2. Appellant is estopped from challenging the jurisdiction of the arbitrators.

3. The issues and proceedings before the arbitrators clearly indicate that its award included appellant's claim for \$6,000.

4. The confirmation of the award and the entry of judgment thereon is *res judicata* of appellant's claim for \$6,000.

ARGUMENT

1. The District Court's original order staying the action and refusing to enjoin the pending arbitration proceedings, conclusively established that both causes of action were covered by the arbitration clause. Therefore, appellant was precluded from reasserting before the District Court that the first cause of action for \$6,000 was never submitted to the arbitrators, but was the subject of further affirmative action thereon, following the award and payment thereof.

Section 3 of the United States Arbitration Act (9 U.S.C. § 3) authorizes federal courts to stay proceedings involving an issue which is referable to arbitration under an agreement in writing for such arbitration.

In this case, appellee moved for a stay pursuant thereto (Tr. 11) and appellant moved to enjoin and restrain appellee from proceeding with the arbitration proceedings (Tr. 40). Said motions placed in issue the question whether each of appellant's causes of action was subject to arbitration under the written agreement.

Thus with respect to the first cause of action, appellant asserted in its motion to enjoin:

“That under the original written agreement between the parties, dated August 14, 1959, there remains due, owing and unpaid to the plaintiff the sum of \$6,000, which by the defendant’s admission, in its demand for arbitration, remains unpaid and undisputed, and upon which there remains no ground for arbitration under said written agreement.” (Tr. 42).

The District Court’s order of February 18, 1960 (Tr. 72) resolved this issue in favor of appellee in sustaining its motion for stay, and denying appellant’s motion to restrain appellee from proceeding with the arbitration proceedings.

Such order was appealable under Section 1292 (1) of the Federal Judicial Code (28 U.S.C. § 1292 (1)) which permits appeals from interlocutory orders “granting, continuing, modifying, refusing, or dissolving injunctions,” etc.

Ross v. Twentieth Century-Fox Film Corp.
(C.A. 9th, 1956) 236 F.(2d) 632;

Shanferoke Co. & Supply Corp. v. Westchester Service Corp., 293 U.S. 449, 79 L.Ed. 583, 55 S.Ct. 313;

Baltimore Contractors, Inc. v. Bodinger
(1955) 348 U.S. 176, 75 S.Ct. 249, 99 L.Ed. 233.

In an annotation on “appealability of federal district court order granting or denying stay of action pending arbitration” in 99 L.Ed. 241, the author states at page 242:

“The decisions of the federal courts have established that Section 1292 (1) authorizes an appeal from a district court’s grant or denial of a stay pending arbitration where (1) such grant or denial is ordered in the exercise of the district court’s equitable powers, and (2) the effect of the order is to stay a common law action; under such circumstances, the grant or denial of the stay amounts to a grant or denial of an injunction.”

In fact, appellant recognized the appealability of this order by filing notice of appeal therefrom (Tr. 73). Its subsequent abandonment of the appeal thereby conclusively established the correctness of the order, and was not only a tacit recognition on the part of appellant that *both* causes of action were to be arbitrated, but in law had the binding force of establishing that fact.

It is significant that on the day following the filing of notice of appeal, appellant filed its answering statement before the Arbitration Tribunal asserting therein that “this answering statement is submitted in order that the issues may framed and *that the merits of this controversy may be finally determined*” (Tr. 89). In accordance with this statement, it asked the Tribunal for an award “forthwith” in its favor in the sum of \$6,000 pursuant to the terms of the written contract, and an award in the sum of \$16,060.97 on the purported subsequent oral agreement (Tr. 91, 92).

It is also significant that while appellant’s motion and affidavit for dismissal of the appeal was sworn to on August 30, 1960 (Tr. 75), it was not filed with the District Court until February 13, 1961 (Tr. 74), which

was 13 days after the New York Supreme Court entered its order confirming the award of the arbitrators as per form submitted by appellee's counsel (Tr. 130-131).

The inference from this is irresistible that appellant believed that the present approach in moving for summary judgment on the first cause of action before the District Court would probably be more effective than the prosecution of its appeal. In the meantime it wanted to keep both avenues open, depending upon the amount that should be awarded to it by the arbitrators. Certainly, if it had been awarded the sum of \$22,067.97 as originally prayed for, or for that matter the sum of \$18,526.87 as computed in its memorandum at the conclusion of the hearings (Tr. 112), appellant would not have dared to seek an additional \$6,000 from appellee, as was attempted in the later proceedings before the District Court.

In any event, appellant's present attempt, following arbitration and an award, to again assert that the first cause of action was never referred to the arbitrators, but remained always in the bosom of the District Court and subject to a summary judgment thereon, would nullify completely the binding effect of the District Court's original order.

It follows, therefore, that the granting of summary judgment of dismissal of plaintiff's action, following arbitration and the payment of the award thereon, was entirely proper and should be affirmed.

2. Appellant is estopped from challenging the jurisdiction of the arbitrators.

The record clearly establishes that appellant participated solely and on the merits in the arbitration proceedings that were conducted before the American Arbitration Association in the City of New York, the forum and place designated in the written agreement between the parties. Thus it not only asserted in its answering statement that it was being submitted in order "that the issues may be framed and that the *merits* of this controversy may be *finally* determined" (Tr. 89-92), but also prayed for an award in the total amount of \$22,067.97 which it readily conceded included the sum of \$6,000 (Tr. 109-110). After both sides had rested, appellant's counsel renewed the demand he had made in the answering statement for the immediate payment of the \$6,000, and after being informed that there could be only one award stated:

"If the Tribunal Clerk so speaks, then I have no objection." (Tr. 110-111).

The cases are legion that hold that where a party participates in the arbitration proceedings on the merits, it waives any right to challenge the jurisdiction of the arbitrators and is estopped from so doing.

In re Iino Shipbuilding & Eng. Co. Ltd., 175 N.Y.S.(2d) 750;

Harris v. East India Trading Co., 144 N.Y.S.(2d) 894;

Smith v. Polar Cia De Navegacion, Ltda, 181 N.Y.S.(2d) 368;

In re Simplex Machine Tool Corporation and Swind Machinery Company, 144 N.Y.S.(2d) 595;

*In re National Cash Register Company and
Charles Wilson*, 184 N.Y.S.(2d) 957.

Thus in the *Iino Shipbuilding* case, *supra*, the court said at page 753:

“Indeed, participation in selection of the arbitrator is itself a waiver of objection to the items of dispute submitted.”

Also:

“The builder made clear its reservation about going into arbitration; but when it went in it must be deemed by the court to have yielded the reservation.”

In *Harris v. East India Trading Co.*, *supra*, at page 898, it was said:

“There can be no doubt that under present law participation either in selection of the arbitrator or *in any of the arbitration proceedings* estops the raising of the jurisdictional issue as to the making of the contract providing for arbitration.” (Emphasis ours)

3. The issues and proceedings before the arbitrators clearly indicate that its award included appellant's claim for \$6,000.

Not wishing to reiterate what has already been stated in our statement of the case pertaining to the proceedings before the arbitrators, we believe that we can limit our argument on this point by making the following comments.

There can be no question but that the arbitrators understood that one of the issues presented to them for determination was the question of the payment of the sum of \$6,000. This is clear from the questions asked by Mr. Thilly, one of the arbitrators:

“Q. Under your written agreement with Central, were you to furnish to Central, before the balance of \$6,000 was paid to you, an affidavit by Albin’s officers certifying full payment and that there are no claims against or liens against the job? Were you supposed to file that with Central?

A. There is a clause in the contract and I am prepared to do that. I was never asked to do the affidavit. I was unable to make contact with Central Rigging & Contracting Company.

MR. THILLY (one of the arbitrators) You haven’t done it, is that what you mean?

THE WITNESS: I haven’t done so.

MR. THILLY: It provided for it, but you didn’t do it so far?

WITNESS: Yes.

Q. You never provided waivers of lien before getting that \$6,000?

A. No, sir.” (Tr. 107)

And by the question of Mr. Wallace Bock, Tribunal Clerk, to Mr. Harnett:

“Q. Does that amount include the \$6,000?”
(meaning does the \$22,060.97 include the \$6,000)

A. Yes.” (Tr. 110)

It is also plain that from the outset all parties, including the arbitrators, clearly understood that the \$6,000 was an item to be included in the ultimate award.

Thus, (a) appellant’s original submission “that the merits of this controversy may be finally determined,” (b) its repeated insistence upon an *aggregate award* of some \$22,000 which included the \$6,000 item, (c) its

demand at the outset and at the end of the proceedings that the sum of \$6,000 be paid “forthwith,” (d) its acquiescence in the clerk’s advise that this was not possible since there could be only one award, (e) its computation of the damages furnished the arbitrators at the conclusion of the hearings totaling \$18,526.87, which included the \$6,000 concededly due, — clearly belie appellant’s contention that this item “was not submitted to the arbitrators for decision.”

The fact that appellee conceded that \$6,000, being the contract balance, could be assessed against it, does not mean that it was to be left out of the ultimate award. For that matter, appellee’s counsel also conceded that the Board could assess damages against appellee in the sum of \$1,500 (Tr. 109). To be consistent here, appellant should contend that that additional amount was likewise excluded from the ultimate award in view of appellee’s concession.

The issue was fully and finally resolved in the making of the award wherein the arbitrators stated that it was “in full settlement of *all claims* submitted to this arbitration.” The District Court’s conclusion after reviewing the entire record, including the proceedings before the arbitrators, that it was “satisfied that the arbitrators understood and intended that the agreed amounts owing plaintiff were included in the total award,” (Tr. 134) was therefore correct and should be affirmed.

4. The confirmation of the award and the entry of judgment thereon is *res judicata* of appellant's claim for \$6,000.

Apparently, appellant was dissatisfied with the award, and by ignoring the pleadings in the arbitration, the proceedings therein, and the language of the award, sought to subvert the final determination of the controversy by subsequent proceedings in the Supreme Court of the State of New York. Thus, after its motion before that court to confirm the award was granted (except for costs), it sought to have the court make a determination that the award *did not embrace the claim of \$6,000*. It not only filed a proposed order to that effect but likewise filed a memorandum in support thereof (Tr. 125-127). In effect, appellant sought the same relief in the New York Supreme Court as it is now seeking by its appeal from the order below which granted appellee's cross-motion for summary judgment dismissing the complaint. The Supreme Court of the State of New York rejected appellant's contention and confirmed the award which specifically stated that it was "in full settlement of *all claims* submitted to this arbitration." Thereupon, it duly entered a judgment against appellee on said award, which was promptly paid by appellee.

In all jurisdictions a party is foreclosed from litigating anew that which has already been determined by a court of competent jurisdiction. In *Corpus Juris Secundum*, Vol. 50, § 592, page 11, the rule is enunciated in the following language:

"Any right, fact, or matter in issue, and directly adjudicated on, or necessarily involved in, the determination of an action before a competent court

in which a judgment or decree is rendered on the merits is conclusively settled by the judgment therein and cannot again be litigated between the parties and privies whether or not the claim or demand, purpose, or subject matter of the two suits is the same. * * *

“*Res judicata* is a rule of universal law pervading every well regulated system of jurisprudence, and is put on two grounds, embodied in various maxims of the common law; the one, public policy and necessity, which makes it to the interest of the state that there should be an end to litigation—*interest republicae ut sit finis litium*; the other, the hardship on the individual that he should be vexed twice for the same cause—*nemo debet bis vexari pro aedem causa*. The doctrine applies and treats the final determination of the action as speaking the infallible truth as to the rights of the parties as to the entire subject of the controversy, and such controversy and every part of it must stand irrevocably closed by such determination. The sum and substance of the whole doctrine is that a matter once judicially decided is finally decided.”

In fact, appellant very frankly concedes on page 17 of its brief that:

“The moving papers submitted by the appellant at the time of the motion fully apprised the New York court of the position of the appellant, *which is the same here.*” (Emphasis supplied)

Thus, it is clear that appellant has had its day in court. It submitted this same issue to a court of competent jurisdiction. The ruling was adverse. No appeal was taken therefrom. The ruling put an end to the controversy. It should therefore be *res judicata* of the issue.

Discussion of Appellant's Authorities

The bulk of the decisions cited in appellant's brief deal with general principles applicable to arbitration proceedings and of the limitations placed upon arbitrators with respect to the issues submitted to them for determination. Appellant has no quarrel with these propositions. The question here is not whether the arbitrators exceeded their authority, but simply whether their lump award of \$9,500 "in full settlement of all *claims* submitted to this arbitration" included the item of \$6,000. The record is clear that this item was not only impliedly, but expressly submitted to them for their consideration. Therefore, discussion of appellant's citations becomes unnecessary. However, on page 11 of its brief, appellant refers to a collateral case in which appellee was involved in the New York Supreme Court and quotes from an opinion rendered on October 14, 1961. The fact of the matter is that the New York Court subsequently reversed itself on a motion to re-argue and fully confirmed the award in that case. In view of the fact that appellant has seen fit to quote from the prior decision in *MATTER OF CENTRAL RIGGING & CONTRACTING CORP. (HOWARD INTERNATIONAL, INC.)*, New York Law Journal, October 14, 1961, we feel it incumbent to quote the entire opinion of Mr. Justice Streit in the Supreme Court in that case, as published in the New York Law Journal on November 29, 1961, and append the same by way of an appendix to this brief.

The following quotation from one of appellant's citations at page 9 of its brief appears to answer appellant's contentions adequately:

“The court will look at the language of the submission in its every part and from a consideration of the whole, will determine the matter of intent. If the reasonable construction appears to be that the parties intended to have everything decided, if anything should be, then a decision of all matters submitted will be imperatively required.”—*Jones v. Welwood*, 71 N.Y. 208 (1877).

Appellee submits that looking at the language of the submission of appellant in its every part and from a consideration of the whole, including the proceedings before the arbitrators, appellant clearly indicated its intent to have everything decided and therefore the award rendered necessarily included the item in question.

CONCLUSION

Appellant's insistence that this claim was not submitted to the arbitrators, flies in the face of what actually transpired. It is aggrieved by the amount of the award and now would have this court ignore all of the facts and grant it a further sum of \$6,000 although its claim for such sum has been fully litigated in the arbitration proceedings and was unquestionably included in the \$9,500 awarded appellant on both of its claims.

This claim has now been fully and completely adjudicated on three occasions: (1) before the District Court on the original motion granting a stay and refusing to enjoin the arbitration, from which an appeal was taken and later dismissed by appellant; (2) before the arbitrators and included within its award; (3) before the New York Supreme Court, in its refusal to adopt the same contentions as are now being made before this court.

Litigation of the same issue must come to a halt, and appellant should not be permitted to flout the rule of *res judicata* by repeating the same arguments and raising the same issues again on this appeal.

The judgment of the District Court in granting summary judgment of dismissal should therefore be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX

Opinion of the Supreme Court of the State of New York, Strett, J., *Matter of Central Rigging & Contracting Corp. (Howard International, Inc.)* October 14, 1961, New York Law Journal, November 19, 1961:

“Matter of Central Rigging & Contracting Corp’n (Howard Internat., Inc.)—After careful study of the papers on this motion, and on the original motion, as well as the record before the arbitrators, the court is satisfied that the amendments allowed by the arbitrators, did not violate the rules of the American Arbitration Society and that the arbitrators were not guilty of an abuse of discretion in permitting the amendments. The amendments did not make ‘any new or different claim,’ within the meaning of section 8 of said rules, and respondent was afforded ample opportunity to attempt to meet them. It is accordingly unnecessary to determine whether, if the amendments had made ‘new or different’ claims, the arbitrators could reasonably construe the second sentence of section 8 (*supra*), as permitting them to consent to amendments at the hearing, without compliance with the requirements of the first sentence of the section.

“The contention that the award makes no disposition of the counterclaim is without merit, for the award states that it is ‘in full settlement of all claims submitted to this arbitration *by either party against the other*’ (italics supplied).

“The contention that the award should be vacated, because it does not make a separate decision as to each claim asserted, is overruled. There is no legal requirement that an arbitrator make a separate determination of each separate claim, or even that a lump sum award state the manner in which the lump sum was arrived at.

“Respondent makes much of the contract provision limiting claims for extras to those evidenced by a prior written approval signed by respondent. *Even in a court of law*, such a provision does not prevent recovery for extras not so evidenced, on the theory of waiver (*La Rose v. Backer*, 11 App. Div.2d 314, 319-320; *Langley v. Rouss*, 185 N.Y. 201, 207-8; *Soloman v. Vallette*, 152 N.Y. 147, 151; *Arrow Plumbing Co. v. Dare Const. Corp’n*, 212 N.Y.S.2d 438, 441), or estoppel (*Imperator Realty Co. v. Tull*, 228 N.Y. 447, 453). *A fortiori*, arbitrators, who need not be lawyers and who are not bound to decide according to legal principles may permit a recovery for extras, notwithstanding the absence of written approval required by the contract, where the evidence permits them to find a waiver or an estoppel.

“The other points made by respondent, based on alleged misconduct of petitioner’s counsel, alleged re-writing of the agreement by the arbitrators, the acceptance of affidavits as evidence, alleged partiality of the arbitrators, &c., do not require discussion. The court is satisfied that they do not warrant vacatur of the award.

“The motion for reargument is granted, and on such reargument, the motion to confirm the award, with the date of the contract, as stated in the preamble, corrected to April 28, 1959, is granted and the cross-motion to vacate award denied. Settle order.”